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Women Are Human: Gender-Based Persecution Is A Human Rights Violation Against Women

*Priscilla F. Warren**

The woman who demands her human rights is not a supplicant or a seeker of charity, but a person with dignity demanding a just outcome according to widely accepted criteria of fairness.¹

In an era of seemingly endless discussions of human rights and human rights violations, women are often singled-out as targets solely because they are women. For example: in Iran, a fifty-five year old woman, her arms full of groceries, was arrested and imprisoned where she received eighty lashes with a whip because her head scarf had slipped back from her forehead and a lock of her hair was showing;² in Pakistan, a fifty-five year old grandmother, arrested and imprisoned for opening her gate to two young females wanting to rent a room in her house, was gang-raped and sodomized by the prison guards, then charged with "zina" (sex outside of marriage - adultery) for which she was beaten with a wide leather strap;³ in India, though officially forbidden by the Indian government, a young widow is expected to throw herself on her dead husband's funeral pyre as Indian society no longer considers she has reason to exist without her husband;⁴ in Saudi Arabia a princess was executed by her grandfather, the brother of the king, for committing adultery;⁵ in Nigeria and other African

* B.M., Florida State University (1973); M.M. Yale University (1976); J.D., St. Thomas University (expected May 1995). The author would like to thank Beverly Horsburgh, Associate Professor of Law, for her advice and guidance in writing this article. It was her enthusiasm and concern for women's rights that inspired this topic. The author would also like to thank Amy D. Ronner, Associate Professor of Law, for her endless encouragement and faith.

1. Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87, 97 (1993) (quoting CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1989)).

2. JAN GOODWIN, *PRICE OF HONOR: MUSLIM WOMEN LIFT THE VEIL OF SILENCE ON THE ISLAMIC WORLD* 108-112 (1994).

3. *Id.* at 49-52.

4. Linda Cipriani, *Gender & Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 520-21 (1993).

5. GOODWIN, *supra* note 2, at 219.

countries, female children are circumcised, in which all or part of the clitoris is removed, or infibulated — all female external sex organs are removed and the flesh is sewn together — all of which is done without sterilization or anesthesia;⁶ in Iraq, a brother murders his sister in order to uphold the family's honor because she failed "to bleed" on her wedding night;⁷ in Bosnia-Herzegovina, Serbian commanders order their soldiers to rape women and young girls as part of a scheme of "ethnic cleansing" so as to eliminate the Muslim populations;⁸ and in many other countries, government officials rape and otherwise sexually abuse women as a means of torture to extract information, to discourage political activity or as a means of punishing or discouraging the activities of family members.⁹ Some of these countries have laws which prohibit such violence against women, but because of culture and tradition, the governments turn a "blind eye" to the commission of such atrocities. None of these women were able to seek refuge in the safe harbor of another country. However, had they been able to escape their persecutors, could they have been granted asylum in another country based on the gender-related violence against them?

INTRODUCTION

There is little doubt that women throughout the world suffer simply because they are women. The brief scenarios presented above are but a small sample of the gender-based persecution to which women are subjected. "Violence against women, and specifically intimate violence, is increasingly being recognized as a human rights violation."¹⁰ Although

6. Cipriani, *supra* note 4, at 526.

7. Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 632 n.28 (1993) (quoting Kanan Makiya, *Rape in the Service of the State*, NATION, May 10, 1993, at 627).

8. *Id.* at 632-33 n.29.

9. *Id.* at 631 n.26 (citing AMNESTY INT'L WOMEN ON THE FRONT LINE: HUMAN RIGHTS VIOLATIONS AGAINST WOMEN (1991)).

10. *The Draft Declaration on the Elimination of Violence Against Women*, U.N. DOC. E/CN.6/WG.2/1992/L.3, defines "intimate violence" as:

[A]ny act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or private life. . . . [It] shall be understood to encompass, but not be limited to, the following: (a) physical, sexual and psychological violence occurring in the family, including battering, . . . marital rape, . . . non-spousal violence . . .

As quoted in, Pamela Goldberg, *Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT'L L.J. 565, 569 n.8 (1993). Goldberg suggests that acts of intimate violence should not be limited to the marital union, but "should rather encompass acts perpetrated by any male intimate whether or not related by blood" and that the term "domestic violence" implies a kind of "tame, less serious violence." *Id.*

the widespread impact of intimate violence in the United States has been brought to the forefront of the public through the recent media blitz of Nicole Simpson's tragic murder and O.J. Simpson's trial, the United States is still lagging behind in its efforts to recognize the significance and severity of the maltreatment of women throughout the world. Often, the victim's own government cannot or will not control the perpetrator; the state itself then also becomes a perpetrator. However, efforts are being made by international organizations, including the United Nations, to provide protection to women who are victims of gender-based persecution.

This article explores the existing U.S. immigration and asylum law regarding gender-related persecution. It describes the existing international and U.S. law as it relates to women seeking refuge from gender-based persecution in their homeland. This article looks at the limitations of current U.S. law relating to victims of gender-based persecution and the necessity of incorporating existing international laws, which do provide some protection to victims of gender-based persecution, into U.S. immigration and asylum law.

Part I examines existing international human rights instruments which could protect women if their home country fails to, or is unable to adequately protect them from gender-related violence. The expansion of the definition of "refugee" to include anyone having a well-founded fear of persecution based on gender is examined as a means of providing greater protection for women.

Part II examines current U.S. asylum law. U.S. immigration laws exist which provide a statutory basis for offering asylum to victims of gender-based persecution. Asylum is available to individuals who are persecuted for reasons falling within one of the five enumerated categories: race, religion, nationality, political opinion, and membership in a particular social group. Two of these categories, "political opinion" and "membership in a particular social group" are categories into which sex-based persecution readily fits.

Parts III, IV and V discuss the element of "well-founded fear of persecution" based on "political opinion" and "membership in a particular social group." Case law in the United States is examined for its inconsistent application of these categories.

Part VI looks at the current procedures used in interviewing female applicants and in adjudicating their claims. It examines measures by which these procedures could be improved, thus allowing for sensitivity in dealing with women seeking asylum.

This article concludes with a recently decided deportation case in which a Nigerian mother's two minor-aged daughters faced genital mutilation upon their return to their mother's homeland. The outcome of this case has opened the door of hope for women illegally living in the United States and

faced with possible deportation. It reveals that gender-based persecution is a viable ground for the granting of asylum.

I. INTERNATIONAL LAW

Violence against women is widespread throughout the world. It is tolerated as a "social phenomenon" — the "rightful consequence of being female."¹¹ However, because of a growing concern about the treatment of women, the international community has promulgated instruments which advance the rights of women and the protection of those rights in the areas of employment,¹² education,¹³ and political participation.¹⁴ Several instruments exist which observe and condemn sex discrimination.¹⁵ However, while these instruments recognize women's human rights, commentators assert that they have not been "interpreted and enforced in a manner consistent with the vigorous protection of women that they mandate."¹⁶ Despite the good intentions of these instruments, the development of remedies for women subjected to gender-based human rights violations is incomplete.

The international community has already condemned gender-based discrimination through various treaties including the United Nations Charter,¹⁷ the Universal Declaration of Human Rights¹⁸ and the Conven-

11. Jane Roberts Chapman, *Violence Against Women as a Violation of Human Rights*, 17 SOCIAL JUSTICE 54, (No. 2 1990).

12. Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, *opened for signature* June 29, 1951, 165 U.N.T.S. 303; Convention Concerning Discrimination in Respect of Employment and Occupation, *opened for signature* June 25, 1958, 362 U.N.T.S. 31.

13. Convention Against Discrimination in Education, *opened for signature* Dec. 14, 1960, 429 U.N.T.S. 93.

14. Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, 27 U.S.T. 1909, T.I.A.S. No. 8289, 193 U.N.T.S. 135. This convention was the first U.N. legal instrument dealing exclusively with women's rights. It states that women shall be eligible, on equal terms with men, to vote in all elections, to hold public office, and to exercise all public functions established by national law. It is the basis for universal suffrage. It was ratified by the U.S. in 1976. Chapman, *supra* note 11, at 67.

15. *Declaration on the Elimination of Discrimination Against Women*, U.N. GAOR, 22d Sess., Supp. No. 16, at 35, U.N. Doc. A/2263 (1967) [hereinafter DEDAW]; Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 19 I.K.M. 33 [hereinafter CEDAW], both as cited in, David L. Neal, Note, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 223 n.104 (1981).

16. Neal, *supra* note 15, at 223 (quoting Laura Reanda, *Human Rights and Women's Rights: The United Nations Approach*, 3 HUM. RTS. Q. 11, 12 (1981) ("Although the principle of equality between the sexes has been enshrined in the basic human rights instruments, in practice the interpretation and implementation of these instruments . . . has fallen far short of ensuring their full applicability to women as an oppressed and vulnerable social group.")).

17. U.N. CHARTER.

tion of the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁹

The U.N. Charter lists among its purposes "[the achievement of] international co-operation in . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."²⁰ The Universal Declaration declares that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex. . . ."²¹ It further states that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law."²²

The Universal Declaration not only urges the recognition of human rights but expects nations to provide a remedy when those rights have been denied. Under the Universal Declaration, a victim of human rights violations has a "right to an effective remedy by the competent national tribunals" responsible for protecting those rights.²³ That is, the state itself has a responsibility to protect all of its people against human rights violations. However, the Universal Declaration also requires access to foreign courts when domestic conditions merit it.²⁴ For example, when a victim of human rights violations is unable to avail herself or himself of governmental protections within his or her own country, that victim is entitled, under the Universal Declaration, "to seek and enjoy" asylum elsewhere.²⁵

Although the United States is not a signatory of the Universal Declaration and thus is not bound by it, "the Universal Declaration has become the accepted general articulation of recognized human rights."²⁶ The Universal Declaration "codifies customary international law."²⁷ U.S. courts have used the normative content of the U.N. Charter and the Universal Declaration in "determining the content and contours of various rights guaranteed by U.S. law."²⁸

18. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/Res/217 (1948) [hereinafter *Universal Declaration*], as cited in, Neal, *supra* note 15, at 224 n.108.

19. See CEDAW, *supra* note 15.

20. U.N. CHARTER art. 1(3).

21. *Universal Declaration*, *supra* note 19, art. 2.

22. *Id.*, art. 7.

23. *Id.*, art. 8.

24. *Id.*, art. 6.

25. *Id.*, art. 14(1).

26. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 701 introductory note (1982).

27. Cipriani, *supra* note 4, at 542.

28. Richard B. Lillich, *International Human Rights Law in U.S. Courts*, 2 TRANSNAT'L L. & POL'Y. 1 (Spring 1993).

CEDAW was enacted to effectuate measures needed to eliminate sex discrimination.²⁹ CEDAW provides for women's legal equality³⁰ and demands that states "modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."³¹ CEDAW further requires that the signatory nations "establish legal protection of the rights of women . . . and ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination."³²

One commentator analogizes "sex discrimination" to "gender-based persecution."³³ CEDAW defines sex discrimination as any "sex-based distinction which has the effect or purpose of detracting from women's human rights and fundamental freedoms."³⁴ The persecution of women, which by definition involves "a threat to [their] life or freedom,"³⁵ does detract from a woman's human rights and fundamental freedoms and thus, is a form of sex discrimination within the meaning of CEDAW.³⁶ As this commentator eloquently states, "[d]iscrimination against women and the persecution of women are kindred human rights violations; the victims of sex-based persecution should be entitled to seek asylum under international law as expressed in these agreements."³⁷

CEDAW specifically prohibits all forms of discrimination against women. It does not, however, address the issue of whether violence against women is a form of discrimination.³⁸ A recent recommendation by the committee that monitors the implementation of CEDAW stated that "the

29. CEDAW, *see supra* note 15. It identifies "measures to be taken to eliminate discrimination against women in various fields, including political and public life, nationality, education, employment, health, marriage and family. It gives special attention to the rights of rural women, the need to eliminate gender stereotypes, to suppress the exploitation of prostitution, and to accord women equality with men before the law." Chapman, *supra* note 11, at 69.

30. CEDAW, *supra* note 15, art. 15(1) & (2).

31. *Id.*, art. 2. Article 5 of CEDAW "requires party states 'to modify the social and cultural patterns of conduct which foster' or sustain sexual stereotyping." Neal, *supra* note 15, at 226 n.124.

32. CEDAW, *supra* note 15, art. 2(c).

33. Neal, *supra* note 15, at 226-27.

34. CEDAW, *supra* note 15, art. 1.

35. "A threat to life or freedom on account of race, religion, nationality, political opinion or membership in a particular social group is always persecution." OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER OF REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, ¶ 51, at 14 (1979) [hereinafter UNHCR HANDBOOK]. Although there is no statutory definition of persecution under U.S. asylum law, there is case law: Persecution is "the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive." Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969).

36. Neal, *supra* note 15, at 226-27.

37. *Id.* at 227.

38. Goldberg, *supra* note 10, at 580.

definition of discrimination against women in Article I of CEDAW includes gender-based violence.”³⁹ Unfortunately, the committee failed to specifically “characterize violence against women as a human rights violation,” rather, “it is addressed strictly as an issue of discrimination.”⁴⁰ This failure to characterize gender-based violence as a human rights violation has once again limited the protection of women to issues of discrimination and equality.

One commentator suggested that CEDAW’s ability to protect women is hindered by the signatories’ reservations to certain articles of the CEDAW.⁴¹ For example, Article 16 of the CEDAW requires states to eliminate discrimination in marriage and family relations. By reserving this article, the state need not protect women from discrimination within the “most pervasive aspect of their lives: the home.”⁴² Thus, a country’s ratification of the CEDAW may be a mere formality which politicians can then point to as an indication of their country’s efforts to protect women, but which, in reality, provides women with almost no protection.⁴³

Although it has been estimated that two-thirds of the world’s refugees are women and girls,⁴⁴ the asylum claims of women refugees go unaddressed under the 1951 Convention Relating to the Status of Refugees.⁴⁵ The Convention’s definition of “refugee”⁴⁶ is gender-neutral. However,

39. *Id.*

40. *Id.* at 580 n.75.

41. To encourage acceptance of the CEDAW, states were permitted to reserve articles. Such a reservation limits or exempts the state’s compliance with that article. For example, some states reserved that they would comply only to the extent that the article did not conflict with domestic policies, usually based on religious traditions. Cipriani, *supra* note 4, at 544.

42. *Id.*

43. *Id.* at 544-45.

44. Kelly, *supra* note 7, at 626 n.1, quoting *The Activities and Programmes of the United Nations High Commissioner for Refugees on Behalf of Refugee Women*, World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, U.N. GAOR, 36th Sess., Agenda Item 7, at 5, ¶ 14, U.N. Doc. A/CONF.116/11 (1985).

45. United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951 (Geneva), 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 137 (1950) [hereinafter *Convention*].

46. Article I of the Convention defines “refugee” as follows:

[As a result of events occurring before January 1, 1951] and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, or for reasons other than personal convenience, is unwilling to return to it.

Convention, *supra* note 45, at art. 1, §A(1) & (2).

it is much more difficult for women than it is for men⁴⁷ "to meet the eligibility criteria for refugee status because of the absence of explicit recognition of gender-based persecution, and because of the social and political context in which the claims of women are adjudicated."⁴⁸ Generally, refugee and asylum laws emphasize "individual targeting" and "specific deprivation of civil and political rights,"⁴⁹ rather than "social and economic rights" that affect a large segment of a population.⁵⁰ Thus, even human rights law favors "male-dominated public activities over the activities of women which take place largely in the private sphere."⁵¹

The key criteria for being a refugee are drawn primarily from the realm of public sphere activities dominated by men. With regard to private sphere activities where women's presence is more strongly felt, there is primarily silence — silence compounded by an unconscious calculus that assigns the critical quality 'political' to many public activities but few private ones. Thus, state oppression of a religious minority is political, while gender oppression at home is not.⁵²

This distinction between the public and private spheres is one of the major obstacles to the achievement of human rights for women.⁵³

One commentator noted that if the Convention's definition of refugee were expanded to include those with a well-founded fear of persecution

47. Maureen Mulligan, in her article entitled *Obtaining Political Asylum: Classifying Rape as a Well-Founded Fear of Persecution on Account of Political Opinion*, 10 B.C. THIRD WORLD L.J. 355 (1990), states that "[i]nequalities in the law do not exist because of a mistake in a legal process sense of analyzing the principles of law." *Id.* at 377.

The roots of sexism are deeper: Male dominance is perhaps the most pervasive and tenacious system of power in history . . . it is metaphysically nearly perfect. Its point of view is the standard for point of viewlessness, its particularity the meaning of universality. Its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy.

Id. (quoting Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 635, 638-39 (1983)).

48. Kelly, *supra* note 7, at 627.

49. *Id.* at 627.

50. *Id.* at 627 n.9.

51. *Id.* at 628. Kelly suggests that the "overt expression of political opinion through traditional means such as involvement in political parties and organizations or participation in military actions may be considered a basis for political asylum, while less traditional means of political expression such as refusal to abide by discriminatory laws or to follow prescribed rules of conduct are often categorized as personal preference." *Id.* at 628 n.10. See also Celina Romany, *supra* note 1, for an excellent article discussing the distinction between the public and private spheres as it relates to violence against women.

52. Kelly, *supra* note 7, at 628 (quoting Doreen Indra, *A Key Dimension of the Refugee Experience*, 6 REFUGEE 3 (1987), quoted in Jacqueline Greatbatch, *The Gender Difference: Feminist Critiques of Refugee Discourse*, 1 INT'L J. REFUGEE L. 518, 519 (1989)).

53. *Id.* at 628 n.10.

because of their gender, "individual women who opposed the rules and traditions of their society and were persecuted because of it would be protected."⁵⁴ No longer would women have to show that they were "members of a social group of persecuted women with common beliefs and practices,"⁵⁵ it would be enough to prove they were persecuted simply because they were women. Women would be protected from "institutionalized misogyny in which the government carries out, sanctions, or ignores oppression of or violence against women because they are women."⁵⁶ An expansion of the term "refugee" to include "gender-based persecution could offer protection to women in circumstances which are normally considered within the 'private' sphere of international law" and as such, are normally ignored.⁵⁷ Such an expansion of the term "refugee" would also be "consistent with the international community's commitment to promoting human rights and the rights of women."⁵⁸ It would provide "concrete protections, where now there are often little more than indefinite commitments toward eliminating gender-based discrimination."⁵⁹ The Convention does not require states to admit refugees or grant them asylum.⁶⁰

The U.N. High Commissioner for Refugees Executive Committee's 1985 Conclusion on Refugee Women acknowledged that refugee women and girls are often in a "vulnerable situation which frequently exposes them to physical violence, sexual abuse and discrimination."⁶¹ In its report, the Executive Committee concluded:

54. Cipriani, *supra* note 4, at 538.

55. *Id.*

56. *Id.* at 513.

57. *Id.* at 539. According to Cipriani, "the public sphere of international law governs relations between states, while the private sphere consists of problems within the state where international law has not recognized legal interest." She points out that this distinction "exempts states from responsibility for religious or cultural practices that persecute women unless their agents were directly responsible and that responsibility could be imputed to the state." *Id.* at 539-540.

58. *Id.* at 542.

59. *Id.*

60. Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 505 (1993). The Convention only "requires states to grant certain rights to those refugees the states have decided to admit. Article 33 of the Convention prohibits states from returning refugees to territories where they would face threats to their life or freedom [because of] their race, religion, nationality, political opinion or membership in a social group" (involuntary repatriation - *non-refoulement*). "Article 32 forbids the expulsion of refugees lawfully present in the country absent compelling reasons of national security or public order. Article 31 prohibits states from penalizing refugees who entered the country illegally, so long as they have come directly from a territory where their lives or freedom were threatened and they present themselves to the police immediately." *Id.* at 511 n.26.

61. Goldberg, *supra* note 10, at 589, quoting *Conclusion No. 39 (XXXVI), Refugee Women and International Protection*, ¶ (d) U.N. Doc. HRC/IP/2/Rev. 1986 (July 8, 1985).

[S]tates, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh and inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention.⁶²

Thus, the Executive Committee recognized the unique circumstances women face and declared that "states may recognize gender-based persecution claims of women seeking refugee status."⁶³ However, because their report left this option open to the states of recognizing gender-based persecution claims, inconsistencies in enforcing this provision are prevalent throughout the international community.⁶⁴

In 1991, the UNHCR adopted its *Guidelines on Refugee Women*, which call for states to "[promote acceptance] in the asylum adjudication process of the principle that women fearing persecution or severe discrimination on the basis of their gender should be considered a member of a social group for the purposes of determining refugee status."⁶⁵ As one commentator notes, these "*Guidelines* confirm the existence of gender-based persecution and encourage states to recognize claims for asylum and refugee status of women fleeing gender-based persecution."⁶⁶ However, once again, by leaving the option of enforcing or ignoring the provision up to individual states, inconsistencies in its application have resulted.

For example, the Canadian government now applies the UNHCR's interpretation of the Convention in extending protection to women fleeing gender-related persecution. Recently, a Saudi Arabian woman, Nada, sought asylum in Canada because "[she] was a woman" who believed she was a victim of gender-based persecution in her own country.⁶⁷ In Saudi Arabia, women are required to cover themselves completely when they are in public. When Nada began removing her face veil in public, "men threw stones at [her] or called [her] a prostitute."⁶⁸ Saudi Arabia's religious police attempted to arrest her simply because her face was uncovered.⁶⁹

62. Report of the 36th Session of the Executive Committee of the High Commissioner's Programme, ¶ 115(4)(k), U.N. Doc. A/AC.96/673 (1985), as quoted in, Cipriani, *supra* note 4, at 536.

63. Goldberg, *supra* note 10, at 589.

64. Cipriani, *supra* note 4, at 536-37. Cipriani illustrates this problem with examples of women seeking refuge in Germany, the United Kingdom and the United States.

65. *Guidelines on the Protection of Refugee Women*, Office of the United Nations High Commissioner on Refugees, at 40, ¶ 71, U.N. Doc. ES/SCP/67 (1991) [hereinafter *UNHCR Guidelines*], as quoted in, Kelly, *supra* note 7, at 664 n.187.

66. Goldberg, *supra* note 10, at 589.

67. Jan Goodwin, *From the Valley of the Chador*, MIRABELLA, April 1994, at 106.

68. *Id.* at 108.

69. *Id.*

Thus, Nada made the decision to leave her country. She waited three years for a passport and, even then, her brother had to accompany her out of the country. She was initially denied refugee status because Canada did not recognize gender-based persecution as a ground for refugee status.⁷⁰ However, on January 29, 1993, the Canadian government, reacting to the Canadian public outcry, announced it would allow Nada to stay in Canada only on "humanitarian grounds," thereby making it clear that a "new, gender-based asylum category" had not been established.⁷¹ Since then, Canada has developed and adopted Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution which "reflect a comprehensive understanding of gender-based persecution claims and make a range of recommendations for effectively evaluating and accepting such claims."⁷² Unfortunately, the United States does not yet have an equivalent to the Canadian Guidelines.⁷³

II. UNITED STATES ASYLUM LAW

Two cases currently pending in U.S. courts involve women who sought asylum.⁷⁴ Nora, a Honduran, was so severely beaten by her prominent, well-to-do husband, that she had to be hospitalized. Her family went to the police to file a complaint but were told that not only would it be expensive, but also that nothing would come of it because Nora was "his woman" and he could do as he pleased. Nora fled to her parents' home, where her husband, finding her alone, raped her at gunpoint. She became pregnant. Seven months later, Nora was struck by a vehicle and dragged for almost two blocks. She was rushed to the hospital where she lay in a coma for three days. Nora later gave birth to a child born two months premature and weighing only three and one-half pounds. Bystanders had noted the license plate of the vehicle that was traced back to her husband. As a result, her

70. Two male members of Canada's immigration board advised Nada that she "would do well to comply with the laws of her homeland" and to "show consideration for the feelings of her father, who [was] opposed to the liberalism of his daughter." *Id.*

71. *Id.* at 106.

72. Goldberg, *supra* note 10, at 589.

73. However, Deborah Anker, Head of the Immigrant and Refugee Program at Harvard University, and Nancy Kelly, Professor of Law at Harvard University, are currently drafting for the Immigration and Naturalization Service "guidelines designed to recognize claims specific to women, making gender-based persecution grounds for obtaining asylum in the United States." These guidelines would not have regulatory authority, but are "intended to provide a context within which asylum officers might better recognize and understand women's claims." Sally Jacobs, *Persecution Based on Sex is Viewed as a Cause for Asylum*, BOSTON GLOBE, April 8, 1994, § 3, at 1.

74. These two histories are taken from the actual cases as presented by Pamela Goldberg, *supra* note 10 at 565-68. Nora's case is currently pending in a New York City Immigration Court; Julila's case is currently pending before the Immigration and Naturalization Service (INS). *Id.* at 565 n.1 & 567 n.3.

husband was required to pay her hospital bill. However, no investigation was conducted and no charges were filed against him. Several months later the husband took the baby from Nora and refused to return the child. Nora filed kidnapping and assault charges against her husband but the clerk refused to accept the papers. Though she was eventually awarded custody of her child, Nora was never allowed to testify as to the rape and the assault. After her husband fired shots at both her and her mother, Nora's family notified the police and pressed charges for assault and trespassing. The police refused to intervene, claiming this was a "domestic dispute." Following this incident, Nora fled to the United States, but was almost immediately apprehended by the Immigration and Naturalization Service (INS) and placed in deportation proceedings.⁷⁵

Julila, a Pakistani, is married to a lawful permanent resident of the United States. She joined her husband on a visitor's visa which has expired. They have been married for twenty-two years and have two sons, one of whom is mentally challenged. Throughout her marriage, her husband has abused her verbally and physically. He refused to petition for her to obtain lawful status, her only means of obtaining legal residency, and threatened to turn her in to the INS if she refused to do his bidding. After one particularly severe beating, Julila found a shelter which accepted her in spite of her uncertain immigration status. Julila's family and her husband's family both informed Julila that she was no longer welcome in Pakistan because of the disrespect she had shown to her husband, and threatened to harm her if she tried to leave him and return to Pakistan.⁷⁶

There is currently no remedy available to either of these women. Their homelands will not protect them, and as refugees,⁷⁷ the United States will not grant them asylum⁷⁸ based on gender persecution. Their futures lie

75. Goldberg, *supra* note 10, at 565-66.

76. *Id.* at 567-68.

77. The United States defines 'refugee' as a person "who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (1982).

78. Under U.S. jurisprudence, asylum is the discretionary grant of haven to an individual who meets the definition of refugee in 8 U.S.C. § 1101(a)(42) (1982). Although 8 U.S.C. § 1158(a) (1982) authorizes the Attorney General to determine the procedure for asylum, the term is nowhere statutorily defined. The distinction between 'refugees' and 'asylees' is one of location when refuge in the United States is sought. "Technically speaking, 'asylees' differ from 'refugees' in that [asylees] can make their applications only once they have entered or as they seek to enter the U.S.; refugees apply and are processed at designated locations in third-countries outside of the U.S." A. HELTON, MANUAL ON REPRESENTING ASYLUM APPLICANTS 1 (1984).

In order to gain lawful permanent resident (LPR) status through marriage, the spouse who is a U.S. citizen or LPR must file an application on behalf of the one seeking status. Prior to 1990, a person whose spouse petitioned for her when the couple had been married

with the legal system of the United States, a system of law, which, though facially gender-neutral, is based on a patriarchal viewpoint of women and society.⁷⁹

The United States Constitution declares “. . . all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁸⁰ This provision provides that a self-executing treaty or a non-self-executing treaty⁸¹ when implemented by Congress, supercedes all inconsistent state and local laws, and, under the “last-in-time” rule, any earlier inconsistent federal laws.⁸²

Although international human rights law has evolved from various sources and materials, both international and national, courts must look first at their nation’s own law to determine the scope and content of the human rights recognized and protected in their country.⁸³ Therefore, U.S. courts, faced with human rights claims, must first refer to federal and state constitutions, laws, decrees, regulations, court and administrative decisions,

less than two years could only keep her LPR status if he filed a second application within 90 days of the end of a period of “conditional residency.” 8 U.S.C. § 1186(a)-(b) (1988). Today, a waiver exists which eliminates the filing of the second joint petition to remove conditional status if a spouse can show, that she or her child was battered or subject to extreme cruelty by the petitioning spouse. 8 U.S.C. § 1186a(c)(4) (Supp. 1992). This remedy does not address the legal obstacles to gaining LPR status as a woman whose spouse refuses to petition for her, because the waiver only applies in marriages where the initial petition is filed less than two years after the marriage. It also fails to address problems confronting women married to men who themselves do not have legal status.

The Violence Against Women Act of 1993 S.11 and H.R. 1133, 103d Cong., 1st Sess. (1993) is currently pending in Congress. One of the provisions of this bill allows a married woman, who has been battered by her spouse, to file a petition on her own behalf without the cooperation of the LPR or U.S. spouse. If the Act is enacted with this provision, it will provide relief for many women in situations similar to Julila’s. However, it will not address the problem confronted by a woman whose situation may be similar to Julila’s except that she and her abuser are not married, or where her abuser also does not have legal immigration status. In addition, this Act does not help women in Nora’s situation.

79. See generally FEMINIST JURISPRUDENCE (Patricia Smith ed., 1993) (Collection of articles by feminist writers which examine the pervasiveness of the traditional patriarchal view of the American legal system).

80. U.S. CONST. art. VI, § 2.

81. The only distinction between a “self-executing” and “non-self-executing” treaty is whether the treaty was intended to operate of its own force as domestic law binding upon public officials, or whether that effect was intended to be contingent upon further legislative action, i.e., ratification by Congress. ALAN C. SWAN & JOHN F. MURPHY, CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS 1060 (1991).

82. Lillich, *supra* note 28, at 2.

83. *Id.* at 1 (quoting RICHARD B. BILDER, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 3, 6 (Hurst Hannum ed., 2d ed. 1992)).

and policy pronouncements for relevant rules of decision.⁸⁴ However, these courts are also taking international human rights law into account in deciding cases.⁸⁵

For example, customary international law, another source of international law, is not specifically mentioned in the Constitution. However, the Supreme Court has ruled that it is "part of our law, and must be ascertained and administered by the courts . . . , as often as questions of right depending upon it are duly presented for their determination."⁸⁶ Like treaty law, customary international law also supersedes all inconsistent state and local laws,⁸⁷ and all earlier inconsistent federal laws.⁸⁸

There are three international instruments to which the United States looks in viewing international human rights: the U.N. Charter,⁸⁹ the 1967 Protocol Relating to the Status of Refugees,⁹⁰ and by incorporation, the 1951 Convention Relating to the Status of Refugees.⁹¹ The United States ratified the U.N. Charter and thus, it belongs to the "supreme Law of the Land" of the United States. In 1968, the U.S. Congress adopted the 1967 Protocol Relating to the Status of Refugees, in which a community of states resolved to treat refugees humanely and to ensure that no refugee is returned to a country where he or she faces persecution. Because the Protocol adopted all of the articles of the Convention, states that are contracting parties to the Protocol are essentially parties to the Convention as well, even though they did not ratify the Convention.⁹² Thus, in signing the Protocol, the U.S. bound itself to abide by the definition of refugee found in the Convention.⁹³

84. Lillich, *supra* note 28, at 1.

85. *Id.*

86. *Id.* at 1 (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

87. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. e [hereinafter RESTATEMENT].

88. "[I]t has also not been authoritatively determined whether a rule of customary international law that developed after, and is inconsistent with, an earlier statute or international agreement of the United States should be given effect as the law of the United States. In regard to the law of the sea, the United States has accepted customary law that modifies earlier treaties as well as United States statutes." RESTATEMENT, *supra* note 87, at § 115 cmt. d.

89. U.N. CHARTER, *see supra* note 17 and accompanying text.

90. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol].

91. Convention, *see supra* note 45 and accompanying text.

92. UNHCR HANDBOOK, *supra* note 35, para. 9.

93. *See* Protocol, *supra* note 90.

Ratification of the Protocol⁹⁴ forced Congress to update its asylum law. Thus, the U.S. Congress designed the Refugee Act of 1980, which incorporated its obligations under the Protocol,⁹⁵ to provide means for admitting and aiding refugees. The Refugee Act includes a definition of refugee that conforms closely with the Convention definition.⁹⁶ The only substantive difference between the Convention's definition of refugee and that adopted by the United States through the Refugee Act was the Refugee Act's inclusion of "past persecution" as a basis for determination of refugee status.⁹⁷

The Refugee Act provides two specific forms of relief: a discretionary grant of political asylum and a mandatory withholding of deportation.

Under the Refugee Act, the Attorney General has the discretion⁹⁸ to grant political asylum to any person who meets the statutory definition of refugee.⁹⁹ "To establish refugee status, a woman must demonstrate that she has been persecuted in the past or has a fear of future persecution,¹⁰⁰ that her fear is well-founded, that the feared persecution will be by the

94. During the final House debates on the 1980 bill, Congressman Peter Rodino described the bill "as one of the most important pieces of humanitarian legislation ever enacted by a United States Congress." S. Rep. No. 590, 96th Cong., 2d Sess. 20 (1980) *quoted in* Deborah E. Anker & Richard H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 63 (1981).

95. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) [hereinafter the Refugee Act] (codified within the Immigration and Nationality Act, 8 U.S.C. § 1101 (1988)) [hereinafter INA].

96. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987) ("Indeed, the definition of 'refugee' that Congress adopted . . . is virtually identical to the one prescribed by Article 1(2) of the Convention . . .").

97. The Refugee Act defines "refugee" as follows:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race religion, nationality, membership in a particular social group, or political opinion.

INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1988).

98. *See, e.g.,* Matter of Salim, 18 I. & N. Dec. 311 (BIA 1982) (the U.S. Attorney General may order a grant of asylum after weighing factors such as whether entry into the U.S. was legal, whether fraud was perpetrated on U.S. immigration officials, and whether the individual applied for refugee status in a U.S. consulate abroad).

99. INA § 208(a), 8 U.S.C. § 1158 (a) (1988).

100. An applicant can establish eligibility for political asylum based on past persecution even when she does not have a well-founded fear of future persecution. When the applicant makes a showing of actual past persecution, a rebuttable presumption of a well-founded fear of future persecution is created. If the government produces evidence that little chance of future persecution exists in her homeland, her application for asylum is not automatically denied; rather this factor is considered by the court in determining whether to exercise its discretion in granting or denying asylum. *See* Matter of Chen, Int. Dec. 3104 (BIA 1989); 8 C.F.R. § 208.13(b) (1993).

government or by someone whom the government is unwilling or unable to control,¹⁰¹ and that the feared persecution is on account of one of five bases: race, religion, nationality, political opinion or membership in a particular social group."¹⁰² Where an applicant's persecution is based on her political opinion, "the persecution need not be on account of the applicant's actual opinion, but may be based on an opinion imputed to her by the persecutor."¹⁰³

Under the second form of relief provided by the Refugee Act, if the Attorney General determines that an individual's life or freedom would be threatened upon return to her native country on one of the five enumerated grounds, the individual is eligible for a mandatory order withholding deportation.¹⁰⁴

If the Convention's definition of refugee were expanded to include gender as one of the enumerated grounds for a well-founded fear of persecution, the U.S., which is bound by the Protocol which incorporates the Convention, would, theoretically, be obligated to expand its definition

101. While the persecutor will ordinarily be the government, persecution by non-governmental actors may also be found when there is a failure of state protection. ASYLUM BRANCH, IMMIGRATION AND NATURALIZATION SERVICE, BASIC LAW MANUAL: ASYLUM SUMMARY AND OVERVIEW CONCERNING ASYLUM LAW 25 (1991) [hereinafter INS MANUAL]; UNHCR HANDBOOK, *supra* note 35, at ¶ 65. See, e.g., *Arteaga v. INS*, 836 F.2d 1227, 1231 (9th Cir. 1988); *McMullen v. INS*, 658 F.2d 1312, 1315 n.2 (9th Cir. 1981); *Matter of Villalta*, Int. Dec. 3126 (BIA 1990).

102. Kelly, *supra* note 7, at 635-36.

103. Kelly, *supra* note 7, at 636. See *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985). See also Grover J. Rees III, General Counsel, Immigration and Naturalization Service, *Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion* (Jan. 19, 1993) (stating that "persecution inflicted because the persecutor erroneously imputes to the victim one of the protected characteristics set forth in Section 101(1)(42) can constitute persecution 'on account of' that characteristic for the purpose of asylum or refugee analysis." Kelly, *supra* note 7, at 636 n.47.

104. 8 U.S.C. § 1253(h) (1988). While political asylum is a discretionary form of relief, withholding of deportation is mandatory for those who meet the eligibility requirements. An applicant who is granted political asylum cannot be deported to any country and becomes eligible to apply for lawful permanent resident status after one year. 8 U.S.C. § 1159(b) (1988). A grant of withholding of deportation means that an individual cannot be deported to the nation from which he or she fled, until his or her life or freedom is no longer threatened. 8 U.S.C. § 1253(a) & (h) (1988).

The standards of proof for establishing eligibility for asylum and withholding of deportation differ. Case law has established that to establish eligibility for political asylum, the applicant must prove that she has been persecuted in the past or that there is a reasonable possibility that she will be persecuted in the future. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987); *INS v. Stevic*, 467 U.S. 407 (1984). An applicant seeking to establish eligibility for the mandatory status of withholding of deportation, must meet the higher burden of proving that the persecution in the future is more probable than not. *Cardoza-Fonseca*, 480 U.S. 430-31. See also *Stevic*, 467 U.S. at 430 (to be eligible for withholding of deportation, individuals must demonstrate a "clear probability" that they will be persecuted if forced to return to their native countries).

of refugee in the Refugee Act. In so doing, a remedy would be provided for women fleeing their homeland because of gender-based persecution.

III. WELL-FOUNDED FEAR OF PERSECUTION

An applicant who claims eligibility based on a well-founded fear of persecution, must demonstrate that the fear is, in fact, well-founded. In *INS v. Cardoza-Fonseca*,¹⁰⁵ the Supreme Court held that the interpretation of "well-founded fear" should coincide with that of the Protocol.¹⁰⁶ The Convention states that "the expression well[-]founded fear of being the victim of persecution . . . means that a person either has been actually a victim of persecution or can show good reason why he [or she] fears persecution."¹⁰⁷ Following the interpretation of the *UNHCR Handbook*¹⁰⁸ that the well-founded fear of persecution means "a reasonable possibility that an individual would be persecuted upon return to the home country,"¹⁰⁹ the *Cardoza-Fonseca* court stated that fear can be well-founded even with a less than fifty percent chance of the persecution taking place.¹¹⁰ The court went one step further and stated that even a ten percent chance that someone would suffer persecution if forced to return home was sufficient to show a "well-founded fear."¹¹¹ In its explanation, the *Cardoza-Fonseca* court stated that a showing of well-founded fear combined both subjective and objective elements. That is, "the individual must subjectively fear, and that fear must be grounded in objective reality."¹¹² The Board of Immigration Appeals¹¹³ further stated that a

105. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

106. "[O]ne of Congress' primary purposes was to bring United States refugee law into conformance with the . . . Protocol . . ." *Id.* at 436-37.

107. Convention, 189 U.N.T.S. 150 (July 28, 1951), *cited in Cardoza-Fonseca*, 480 U.S. at 438.

108. The *Cardoza-Fonseca* Court recognized that the UNHCR HANDBOOK did not have the force of law or in any way bind the INS. However, it acknowledged that the UNHCR HANDBOOK provides "significant guidance in construing the Protocol." *Cardoza-Fonseca*, 480 U.S. at 439 n.22. *See also* UNHCR HANDBOOK, *supra* note 35.

109. UNHCR HANDBOOK, *supra* note 35, para. 42.

110. *Cardoza-Fonseca*, 480 U.S. at 431.

111. *Id.* at 440.

112. *See also* Goldberg, *supra* note 10, at 575, in which she elaborates on the subjective and objective components of "well-founded fear."

113. The Board of Immigration Appeals [hereinafter BIA or Board] "is an administrative tribunal created by regulation." 8 C.F.R. § 3.1(a)(1) (1990). "Only a small number of BIA decisions are published. Published decisions serve as precedent, binding on immigration judges throughout the country except in jurisdictions where there is a federal court ruling to the contrary." Kelly, *supra* note 7, at 637 n.53 (quoting DEBORAH E. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* 14 (2d ed. 1991)).

fear of persecution is well-founded if a reasonable person similarly situated would fear persecution.¹¹⁴

There would be little difficulty for a woman, especially one who has been physically abused, to show her subjective fear. The difficulty arises in demonstrating that her subjective fear is based on objective reality.¹¹⁵ Realistically, a woman fleeing persecution does not think about obtaining documentation of her persecution because often it is the government itself who is the persecutor.¹¹⁶ As one commentator has noted, this inherent difficulty has been "recognized by the courts,"¹¹⁷ and has been "codified in the asylum regulations"¹¹⁸ and in the "internal guidelines of the Immigration and Naturalization Service."¹¹⁹ Thus, if there is no realistic possibility of obtaining independent evidence to corroborate an applicant's testimony, the adjudicator can rely solely on her testimony.¹²⁰

The Refugee Act of 1980 fails to provide a definition of persecution. The *INS Manual*, however, defines persecution as "a serious threat to life or freedom on account of race, nationality, religion, political opinion, or membership in a particular social group."¹²¹ The *INS Manual's* definition duplicates the *UNHCR Handbook's* definition of persecution with one exception: the *INS Manual* added the word "serious."¹²²

The Ninth Circuit in *Kovac v. INS*,¹²³ defined persecution as "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive."¹²⁴ The *Kovac* court further held that neither physical harm nor threatened bodily harm is necessary to determine that an applicant suffers from a fear of persecution.¹²⁵ In *Matter of Acosta*,¹²⁶ the Board

114. *Matter of Mogharrabi*, Int. Dec. 3028, at 445 (BIA 1987) (following *Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986)). This decision effectively overruled *Matter of Acosta*, Int. Dec. 2986 (BIA 1985) insofar as the Board held that the "clear probability" and "well-founded fear" standards were not different, and thus, were to be treated the same. *Mogharrabi*, Int. Dec. 3028, at 445.

115. "A person must be able to show that the fear has some basis in the reality of the circumstances and not mere irrational apprehension." *Guevara-Flores*, 786 F.2d at 1249.

116. *See infra*, Part VI.

117. *Mogharrabi*, Int. Dec. 3028, at 443 (An applicant's "testimony that is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for [her] fear is sufficient.").

118. *See* 8 C.F.R. § 208.13(a).

119. *INS MANUAL*, *supra* note 101, at 59 & 63.

120. *Goldberg*, *supra* note 10, at 576 nn.41-43.

121. *INS MANUAL*, *supra* note 101, at 20. The Department of Justice drafted the *INS Manual* as a guide for the INS to use in interpreting U.S. asylum law. It is not legally binding, but is a clear indication of the appropriate standard to be used in evaluating asylum claims. *Goldberg*, *supra* note 10, at 577 n.46.

122. *UNHCR HANDBOOK*, *supra* note 35, para. 51.

123. 407 F.2d 102 (9th Cir. 1969).

124. *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969).

125. *Id.* at 106.

126. *Matter of Acosta*, Int. Dec. 2986, at 16-17 (BIA 1985).

defined persecution as "the infliction of suffering or harm in order to punish an individual for possessing a particular belief or characteristic the persecutor seeks to overcome." As recommended by the *UNHCR Handbook*,¹²⁷ the U.S. judiciary, including the BIA, continues to make case-by-case determinations as to what constitutes persecution.

It must be remembered, however, that even if an asylum applicant shows that she has a well-founded fear of persecution, she must then demonstrate that this persecution is based on one of the five enumerated grounds: race, religion, nationality, political opinion or membership in a particular social group.

Even though "gender" is not a category, two categories are available that can be used to establish a well-founded fear of persecution based on one of the five existing enumerated grounds: persecution on account of her political opinion, or on account of her membership in a particular social group. However, the difficulty in using either of these categories becomes evident in the following sections.

IV. POLITICAL OPINION

The Ninth Circuit defined "political opinion" in *Hernandez-Ortiz v. INS*,¹²⁸ in which it stated:

When a government exerts its military strength against an individual or group . . . and there is no reason to believe that the individual or group has engaged in any criminal activity or other conduct that would provide a legitimate basis for governmental action, the most reasonable presumption is that the government's actions are politically motivated.¹²⁹

Within this definition, the Ninth Circuit stressed that because a government does not persecute those who share its ideologies, "it is irrelevant whether a victim actually possesses any of these opinions as long as the government believes that he does."¹³⁰ Thus, the actions of the applicant are not the sole focus of courts in determining what is political. The actions of a government against an applicant can be considered,¹³¹ as well as the actions of a group that a government cannot or is unwilling to control.¹³² Further, in *Bolanos-Hernandez v. INS*,¹³³ the court found that "the reasons underlying an individual's political choice are of no significance for

127. UNHCR HANDBOOK, *supra* note 35, para. 52.

128. *Hernandez-Ortiz*, 777 F.2d 509 (9th Cir. 1985).

129. *Id.* at 516.

130. *Id.* at 517 (citing *Argueta v. INS* 759 F.2d 1395, 1397 (9th Cir. 1985)).

131. *Argueta*, 759 F.2d at 1397.

132. *McMullen v. INS*, 58 F.2d 1312, 1315 n.2 (9th Cir. 1981) (*rev'd on other grounds*).

133. *Bolanos-Hernandez v. INS*, 749 F.2d 1316 (9th Cir. 1984).

purposes of [asylum and deportation claims] and the [U.S.] government may not inquire into them."¹³⁴

Yet, in *Campos-Guardado v. INS*,¹³⁵ the Fifth Circuit upheld the Board's administrative decision, which denied Campos-Guardado's claim of a well-founded fear of persecution on account of political opinion.¹³⁶ The court held that the threats Campos-Guardado faced from her attacker were "personally motivated -- to prevent her from exposing his identity — and that there was 'no indication he maintained an interest in her because of her political opinion or any other grounds specified in the [Immigration and Nationality] Act.'"¹³⁷ In other words, Campos-Guardado was "statutorily ineligible for a discretionary grant of asylum"¹³⁸ because her rape was not the result of her political opinion or a political opinion attributed to her by her attacker.¹³⁹ The court dismissed the appeal by categorizing the incident as "the type of civil strife outside the intended reach of the statute."¹⁴⁰

This seems to support the view that "gender oppression in the home" — rape by a family member — is not a public activity, but rather a private activity, and therefore fails to qualify as a "critical quality" criterion. "Acts of persecution, no matter how severe they may be, cannot be based solely on a personal dispute or vendetta."¹⁴¹

In *Klawitter v. INS*,¹⁴² the Sixth Circuit upheld the Board's decision to deny political asylum and withholding of deportation to a Polish woman who had been blacklisted for her refusal to join the Communist Party and was sexually abused by a colonel in the Polish secret police.¹⁴³ The Board found that the colonel's actions were motivated by his personal interest in the applicant "rather than any interest on his part to 'persecute'

134. *Id.* at 1325.

135. *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987), *cert. denied*, 484 U.S. 826 (1987).

136. *Id.* at 290. Campos-Guardado, while visiting her uncle, the chairman of a local agricultural cooperative in El Salvador, was tied and gagged by guerrilla fighters and forced to watch as her uncle and a male cousin were hacked to death with machetes. The guerrillas then raped Campos-Guardado, while another shouted political slogans. She escaped, but was hospitalized for fifteen days suffering from a nervous breakdown. She later discovered that one of her attackers was a cousin. On numerous occasions he threatened to kill her and her family if she revealed his identity to anyone. She fled to the U.S. and applied for political asylum upon her arrival. *Id.* at 287.

137. *Id.* at 288.

138. *Id.* at 290.

139. *Id.*

140. *Id.*

141. Goldberg, *supra* note 10, at 573 (citing *Desir v. Ilchert*, 840 F.2d 723, 725 (9th Cir. 1988)).

142. *Klawitter v. INS*, 970 F.2d 149 (6th Cir. 1992).

143. It should be noted that the Immigration Judge found the applicant's testimony to be "self-serving" and "uncorroborated;" that it "lacked credibility." *Id.* at 151.

her.”¹⁴⁴ The court, in upholding the Board’s decision, found that the described treatment, characterized by the court as “sexual harassment,”¹⁴⁵ did not rise to the level of persecution, and that the harm was not on account of any of the five bases enumerated in the asylum statute.¹⁴⁶ It must be remembered that mere acts of persecution, no matter how heinous, do not, in and of themselves, establish eligibility for asylum. To establish eligibility for asylum, the applicant must show the harm inflicted was “on account of one of the enumerated grounds.”¹⁴⁷

In *Lazo-Majano v. INS*,¹⁴⁸ the Ninth Circuit overruled the BIA’s decision denying Olimpia Lazo-Majano political asylum. In so doing, it acknowledged rape as form of persecution.¹⁴⁹ This decision, however, creates a conflict within the circuit courts as to whether rape may be considered a “well[-]founded fear of persecution on account of . . . political opinion.”¹⁵⁰ It must be noted that the attacker in *Lazo-Majano* was not a family member, as in *Campos-Guardado*, but rather a Salvadoran army sergeant for whom Olimpia worked as a domestic. If Olimpia’s attacker had been a family member, the Ninth Circuit may have also viewed her rape merely as “gender oppression in the home” instead of as “persecution based on a political opinion imputed to her by her persecutor.”

The Ninth Circuit opened the door to gender-based persecution as a ground for asylum eligibility when it stated, “[the sergeant] is asserting the political opinion that a man has a right to dominate [a woman]” without permitting her to hold an opinion to the contrary.¹⁵¹ The court further recognized: “[The sergeant’s] statement reflects a much more generalized animosity to the opposite sex, an assertion of a political aspiration and the desire to suppress opposition to it.”¹⁵² For the first time, a court recognized that resistance to male domination is an expression of a political opinion. While these statements refer to the political opinion the court felt

144. *Id.* at 151-52.

145. The *Klawitter* court stated:

We agree with the Board that although petitioner’s testimony recounts an unfortunate situation, harm or threats of harm based solely on sexual attraction do not constitute “persecution” under the Act. . . . Congress did not contemplate that a claim of sexual harassment would constitute the type of persecution for which political asylum would be granted.

Id. at 152.

146. *Id.* In *Klawitter*, the court stated: “[I]t is clear that he was not ‘persecuting’ her on account of a proscribed ground. On the contrary he simply was reacting to her repeated refusals to become intimate with him.” *Id.*

147. Goldberg, *supra* note 10, at 572, citing 8 U.S.C. § 1101(a)(42) (1988).

148. *Laza-Mojano V. INS*, 813 F.2d 1432 (9th Cir. 1987).

149. *Id.* at 1434.

150. The Refugee Act, 8 U.S.C. §§ 1101(a)(42), 1253(h) (1982).

151. *Lazo-Majano*, 813 F.2d at 1435.

152. *Id.*

Olimpia expressed by fleeing,¹⁵³ the court could also be implying that men may not dominate women by instilling a fear of rape and persecution in them.¹⁵⁴

Campos-Guardado, *Klawitter* and *Lazo-Majano* are three cases that reveal the lack of a foundation upon which gender-related claims of women can be evaluated. "Each case raised a claim based on political opinion or imputed opinion in which the harm was gender-specific."¹⁵⁵ Though the *Campos-Guardado* and *Klawitter* courts reached conflicting results, neither court "attempted to reconcile their decisions with the *Lazo-Majano* decision or to elaborate principles for determining when gender-specific persecution will be considered politically-motivated."¹⁵⁶ Although the divergent outcomes can be explained by the facts and circumstances of each case, the divergence also reflects two problems in evaluating asylum cases of women: the difficulty in accepting rape and other forms of sexual abuse as violence, and the tendency to ascribe personal motivations to persecutors when the harm is sexual.¹⁵⁷ As Deborah Anker of Harvard's Immigrant and Refugee Program said, "The kinds of harm women face have been traditionally trivialized and considered private; they were not viewed as serious enough to amount to persecution."¹⁵⁸ It must not be forgotten that one of the primary purposes of the U.N. Charter is to achieve international cooperation in promoting human rights and fundamental freedoms *without regard to gender difference*. In denying women their fundamental rights and by not protecting those women who seek refugee status, the United States, as a member of the United Nations, is failing to fulfill one of its primary obligations under the U.N. Charter.

The failure to recognize rape or other intimate violence as persecution reflects the patriarchal interpretations given to the law. Even in U.S. courts, the law tends to focus on the actions of the victim and not the actions of the rapist. Even in today's relatively enlightened society, one hears statements such as "she asked for it," "she didn't really mean 'no,'" "look how provocatively she dresses," or "what was she doing there at that hour?" Thus, it is understandable, though not acceptable, that the U.S.

153. "When by flight, [Olimpia] asserted [a political opinion], she became exposed to persecution for her assertion. Persecution threatened her because of her political opinion." *Id.*

154. See Goldberg, *supra* note 10, at 598, in which she views political opinion in the context of intimate violence. She states that "the opinion expressed is that of rejecting the social norm that a man has the right to dominate his wife or female companion." *Id.*

155. Kelly, *supra* note 7, at 640.

156. *Id.* at 640 nn.72-74.

157. *Id.* at 640-41.

158. Ellen Goodman, *Another Step Toward Redefining Abuse of Women*, BOSTON GLOBE, Mar. 27, 1994, at 75.

judicial system, including the INS and BIA, unwittingly rejects the horror and unwillingness on the part of the woman involved in rape.

Rape is a violation of the human spirit and body. In some countries, rape is used as a means of controlling not only women, but men.¹⁵⁹ So seen, rape is a form of persecution. Thus, if a woman has no legal remedy in her own country, or if her life is endangered by the act of reporting the rape to the authorities, then she has a well-founded fear of persecution on account of political opinion.¹⁶⁰

V. MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

Both courts¹⁶¹ and commentators¹⁶² have struggled to define "particular social group." This category was added to the other grounds for obtaining refugee status by the Swedish delegation to the Convention in recognition of the potential failure of the other four categories to include "all the reasons for persecution an imaginative despot could conjure up."¹⁶³ Some commentators see this as a "catch-all" category¹⁶⁴ meant to protect groups and individuals that do not fall within the categories of race, religion, nationality and political opinion.¹⁶⁵ In the United States, the phrase "particular social group" was first placed in the Immigration and Nationality Act when Congress enacted the Refugee Act of 1980.¹⁶⁶ As

159. Wives, daughters and sisters are raped in front of their husbands, fathers and brothers as a means of coercing the men into submission, extracting information, or punishing or discouraging the political activities of other family members. See AMNESTY INT'L, WOMEN ON THE FRONT LINE: HUMAN RIGHTS VIOLATIONS AGAINST WOMEN (1991).

160. See Mulligan, *supra* note 47, for an in-depth analysis of rape as a well-founded fear of persecution based on political opinion.

161. *Fatin v. INS*, 12 F.3d 1233, 1238 (3d Cir. 1993); *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) ("[I]ndividuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor, or in the eyes of the outside world in general. . . . [A]ttributes of particular social group must be recognizable and discrete"); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) ("a collection of people closely affiliated with each other, who are actuated by some common impulse or interest"); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985) ("normally comprises persons of similar background, habits or social status"); *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985) ("immutable characteristic that individuals are 'unable by their own actions, or as a matter of conscience should not be required' to change").

162. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 29-31 (1983); 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 219-20 (1966); Cipriani, *supra* note 4, at 535; Fullerton, *supra* note 60; Maureen Graves, *From Definition to Exploration: Social Groups and Political Asylum Eligibility*, 26 SAN DIEGO L. REV. 739 (1989); Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39 (1983); Kelly, *supra* note 7, at 625; Neal, *supra* note 15, at 203.

163. Helton, *supra* note 162, at 41-42 & 45.

164. *Id.*

165. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* 147-48 (2d ed. 1991).

166. See Refugee Act, *supra* note 95. The Refugee Act of 1980 amended the provision on withholding of deportation, Section 243(h) of the INA, 8 U.S.C. § 1253(h), and added

stated earlier, the legislative history reveals that Congress intended "to bring [U.S.] refugee law into conformance with the [Protocol],¹⁶⁷ to which the [U.S.] acceded in 1968."¹⁶⁸

There are only a small number of applicants seeking asylum who have based their claims on persecution due to membership in a particular social group. Many of the opinions, however, fail to analyze "membership in a social group" and instead, direct their attention to other aspects of the asylum claims, such as the reasonable likelihood of persecution, the credibility of the asylum seeker, or the political opinion (imputed or actual) of the applicant.¹⁶⁹

In *Matter of Acosta*,¹⁷⁰ a taxi driver sought asylum based on his membership in a particular social group and on his political opinion. Acosta was member of COTAXI, a taxi driver cooperative in El Salvador. Acosta claimed that he feared persecution by the Salvadoran guerrillas because the cooperative refused to participate in work stoppages against the government. This position resulted in the seizure and burning of taxis belonging to the cooperative. Furthermore, the guerrillas had killed five cooperative members. Acosta himself had been beaten by the guerrillas.¹⁷¹ In its analysis of "particular social group", the Board examined the other four bases of persecution recognized under the definition of refugee. They determined that these four categories were less vague than membership in a particular social group. Therefore, the Board turned to the doctrine of *ejusdem generis*,¹⁷² which directs that general words included in a list of more specific words be construed in a manner consistent with the more specific words. Applying this doctrine, the Board interpreted the phrase "persecution on account of membership in a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a "common immutable characteristic:"

The shared characteristic might be an innate one such as sex, color or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot

provisions on asylum, Sections 207 and 208 of the INA, 8 U.S.C. §§ 1157 and 1158.

167. Protocol, *supra* note 90.

168. Cardoza-Fonseca, 480 U.S. at 436-37.

169. Fullerton, *supra* note 60, at 542-543.

170. *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985).

171. *Id.* at 216-17.

172. "Of the same kind, class, or nature." BLACK'S LAW DICTIONARY 517 (6th ed. 1990).

change, or should not be required to change because it is fundamental to their individual identities or consciences.¹⁷³

Thus, the Board in *Acosta* established a two-prong test for asylum eligibility under "membership in a particular social group": the common characteristic defining the group cannot change, or it is one that is so fundamental to the members' individual identity or conscience that they should not be required to change it. In applying this restrictive test to the facts of *Acosta*, the Board found that Acosta's membership in COTAXI and his refusal to participate in work stoppages were not immutable. The Board stated that he could have avoided the threats by either "changing jobs or cooperating in the work stoppages."¹⁷⁴ Interestingly, the Board failed to follow its own analysis. That is, it failed to recognize that Acosta's past as a founder of the taxi cooperative could no more be changed than the past experiences of a military leader or a former landowner. It also failed to recognize that Acosta's membership in the taxi cooperative may have been fundamental "as a matter of conscience" to his identity as a member of society.¹⁷⁵ The *Acosta* two-prong test is "binding on all immigration courts sitting in any region where the circuit court has not ruled to the contrary,"¹⁷⁶ but conflicts with the Ninth Circuit's test, established in *Sanchez-Trujillo v. INS*,¹⁷⁷ which ironically requires a volitional association in establishing membership in a particular social group.

*Ananeh-Firempong v. INS*¹⁷⁸ was the first appellate case to deal with the issue of defining "particular social group." The First Circuit found that membership in a particular social group provided a basis for withholding deportation when members of the group shared and were persecuted for "characteristics that are essentially beyond the petitioner's power to change."¹⁷⁹ The applicant was a Ghanaian woman studying in the United States under a student visa. In applying for withholding of deportation, she claimed that her father's political ties with the recently overthrown political party, her professional education and her membership in the Ashanti tribe, would subject her to persecution by the ruling government. She argued that because of her familial ties, she too was a member of each of these

173. *Acosta*, 19 I. & N. Dec. at 233.

174. *Id.* at 234.

175. *Id.*

176. Goldberg, *supra* note 10, at 594.

177. *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986). See *infra* note 184 and accompanying text.

178. *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985).

179. *Id.* at 626.

particular social groups.¹⁸⁰ The First Circuit broadened the *Acosta* Board's approach to claims of persecution based on membership in a particular social group. It turned to the *UNHCR Handbook*,¹⁸¹ which states:

A 'particular social group' normally comprises persons of similar *background*, habits or *social status*. . . . Membership of [*sic*] such a particular social group may be at the root of persecution because there is *no confidence in the group's loyalty to the Government* or because the *political outlook, antecedents* or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.¹⁸²

Relying solely on the *UNHCR Handbook* sections on particular social group, the court held that the applicant fell "squarely within this definition [of membership in a particular social group as stated in paragraphs 77-78 of the *UNHCR Handbook*.]"¹⁸³

The Ninth Circuit addressed the question of "membership in a particular social group" in *Sanchez-Trujillo*. The court rejected the argument that "young, urban, working class males of military age who have never served in the military or otherwise expressed support for the government"¹⁸⁴ were a particular social group. The court reaffirmed that the characteristics identifying the group must be immutable or of such significance to one's conscience and self-identity that an individual should not be required to change it.¹⁸⁵ Further, the court established four additional criteria in determining the existence of a particular social group: (1) a close affiliation between members of the group, (2) a common impulse or interest upon which the affiliation is based, (3) a voluntary association, and (4) the existence of a common trait by which group members are distinguishable from the general population.¹⁸⁶ Even though the Ninth Circuit articulated a "voluntary association" requirement, it stated that the family is a prototypical example of a particular social group. Family members share affiliational concerns and common interests.¹⁸⁷ Herein lies the contradiction of the court: while characteristics that are

180. *Id.* at 622-23. The applicant presented appropriate documentation to support her claims that these three groups, members of the former ruling party, well-educated people and Ashanti tribespeople, were subject to persecution by the current government. *Id.*

181. See *UNHCR HANDBOOK*, *supra* note 35.

182. *Ananeh-Firempong*, 766 F.2d at 626 (quoting *UNHCR HANDBOOK*, *supra* note 35, ¶¶ 77-78) (emphasis added by the court).

183. *Id.* at 626.

184. *Sanchez-Trujillo*, 801 F.2d at 1573.

185. *Id.* at 1575.

186. *Id.* at 1576.

187. *Id.* at 1576.

immutable are generally involuntary, characteristics that are a "matter of conscience" are usually voluntary.¹⁸⁸ Thus, the "voluntary association" requirement "provides protection from persecution resulting from a choice made by the individual, but inexplicably does not provide protection for persecution resulting from characteristics over which the individual has no control."¹⁸⁹

Once it has been determined that the class suggested is cognizable as a "particular social group,"¹⁹⁰ then three additional criteria must be evaluated to determine whether the applicant will qualify for relief within the social group category: (1) whether the applicant is a member of the suggested group, (2) whether the suggested group "has, in fact, been targeted for persecution on account of the characteristics of the group," and (3) whether the existence of special circumstances warrant *per se* eligibility on that basis.¹⁹¹ Although this last criterion comes directly from the *UNHCR Handbook*, neither the *Handbook* nor the court clarifies the components of "special circumstances." The plain language of the *Handbook* requires a showing of special circumstances only when the applicant offers only her *membership* in the particular social group as support that her fear is well-founded.¹⁹² The court, however, does not add that qualification, thus implying that in all instances "special circumstances" must be shown. In so doing, the court has over-stepped the bounds of the source upon which it has relied.¹⁹³

However, in fairness to the Ninth Circuit, it did state that "the 'social group' category is a flexible one which extends broadly to encompass many groups who do not otherwise fall within the other categories of race, nationality, religion or political opinion."¹⁹⁴ This is consistent with commentators who have interpreted that the "purpose of the social group ground was to encompass those who truly had a well-founded fear of persecution but were unable to fit themselves into one of the other more specifically defined categories."¹⁹⁵

188. Goldberg, *supra* note 10, at 593 n.162.

189. Kelly, *supra* note 7, at 651.

190. *Id.*

191. Sanchez-Trujillo, 801 F.2d at 1574-75.

192. Kelly, *supra* note 7, at 650 n.120, citing UNHCR HANDBOOK, *supra* note 35, at para. 79 ("Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.").

193. Goldberg, *supra* note 10, at 593 n.162.

194. Sanchez-Trujillo, 801 F.2d at 1576.

195. Goldberg, *supra* note 10, at 594. See also *supra* notes 162-65 and accompanying text.

The Second Circuit, in *Gomez v. INS*,¹⁹⁶ "confirmed, for the first time, that a particular social group *may* provide a valid basis for an asylum claim where the fear is of gender-based violence."¹⁹⁷ The *Gomez* court affirmed the Board's denial of the petitioner's claim for asylum based on her membership in a particular social group. She belonged to a group of young Salvadoran women who had previously been brutalized by Salvadoran guerrillas. The court, however, denied her claim because she had been unable to demonstrate that she was "more likely to be persecuted than any other young woman."¹⁹⁸ The court found that members of a group must possess "some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor — or in the eyes of the outside world in general."¹⁹⁹ In confirming the Board's denial of asylum, the Second Circuit stated that "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group."²⁰⁰ In so stating, the court held that "absent other unspecified qualifying attributes, gender [alone] would not suffice."²⁰¹

Gender, *per se*, was not argued as being the social group, but rather the social group was defined as "women who have been previously battered and raped by Salvadoran guerrillas."²⁰² As one commentator points out, "the court did minimal analysis of gender-based persecution" and made "no reference to the international documents and other recent developments in this area."²⁰³ However, this commentator noted that within the court's comments there is an opening to argue that gender could be recognized as a particular social group, and that within that group, battered women would be protected.²⁰⁴ Such recognition is supported by the *UNHCR Conclusion* which stated that "women fearing persecution or severe discrimination on the basis of gender should be considered a member of a social group for the purposes of determining refugee status."²⁰⁵

Recently, the Third Circuit in *Fatin v. INS*,²⁰⁶ followed the *Acosta*

196. *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991).

197. Goldberg, *supra* note 10, at 594 (emphasis added).

198. *Gomez*, 947 F.2d at 664.

199. *Id.*

200. *Id.*

201. Goldberg, *supra* note 10, at 595.

202. *Gomez*, 947 F.2d at 663-664.

203. Goldberg, *supra* note 10, at 595.

204. *See* Goldberg, *supra* note 10, at 595 n.174.

205. Draft Declaration on the Elimination of Violence Against Women, *supra* note 10, at ¶ 71.

206. *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993). *Fatin*, an Iranian woman who entered the United States as a nonimmigrant student, sought asylum and withholding of deportation alleging her well-founded fear of persecution if she returned to Iran. In her application she stated that if forced to return to Iran, she would be subjected to interrogations, forced to

board's interpretation of "particular social group."²⁰⁷ The court then looked to "the elements that an alien must establish in order to qualify for withholding of deportation or asylum based on membership in such a group."²⁰⁸ Fatin did not argue that she faced persecution merely because she was a woman. She argued that she faced persecution because she was "a member of 'a very visible and specific subgroup: Iranian women who refuse to conform to the government's gender-specific laws and social norms.'"²⁰⁹ Because the *Acosta* board specifically mentioned "sex" as an innate characteristic that could link the members of a "particular social group," the *Fatin* court confirmed that the applicant met the first of the required elements. Fatin's problem arose, however, in that she failed to establish that she was a member of this tightly defined group. The court found no evidence in the record to show that her opposition to the Iranian laws was so "fundamental to [her] identity or conscience that [they] ought not be required to be changed."²¹⁰ The court determined that the applicant found these requirements to be "objectionable" and that she would avoid observing them if she could.²¹¹ Thus, Fatin did not really fall inside the "particular social group" of women who "find [the gender-specific] laws so abhorrent that they refuse to conform even though . . . the routine penalty for noncompliance is seventy-four lashes, a year's imprisonment, and in many cases brutal rapes and death."²¹² Because she did not fall within this tightly defined "particular social group," but rather within a larger group of women who "object to and find offensive the wearing of the traditional veil or chador,"²¹³ she also failed to establish the third element required - that the consequences that would befall her as a member of the larger social group constitute persecution. Following the *Acosta* board's interpretation of "persecution" to include threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom,²¹⁴ the *Fatin* court held that persecution "does not encompass all treatment that [U.S.] society regards

attend religious sessions and forced to wear a chador. *Id.* at 1235.

207. *Id.* at 1239. "Whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should be required to change because it is fundamental to their individual identities or consciences." *Id.* at 1240 (citing *Acosta*, 19 I. & N. Dec. at 233).

208. "The alien must (1) identify a group that constitutes a 'particular social group,' . . . (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership." Fatin, 12 F.3d at 1240.

209. *Id.* at 1241.

210. *Id.*

211. *Id.*

212. *Id.* at 1240.

213. *Id.*

214. *Id.* (quoting *Acosta*, I. & N. Dec. at 222).

as unfair, unjust or even unlawful or unconstitutional.”²¹⁵ Further, the court, again following the board in *Acosta*, stated that “requiring a person to renounce his or her religious beliefs or to desecrate an object of religious importance” might be regarded as “torture” as it is “abhorrent to that individual’s deepest beliefs.”²¹⁶ The court, however, qualified this by stating that to constitute “torture” or “persecution,” such actions must be “directed against a person who actually possessed the religious beliefs or attached religious importance to the object in question.”²¹⁷ Therefore, though Fatin, like other Iranian women, found the wearing of the chador to be inconvenient, irritating, mildly objectionable or highly offensive, this was not sufficient enough to constitute persecution.

Even though the Third Circuit affirmed the Board’s decision in denying Fatin’s application for asylum or withholding of deportation, it is still a victory for women. For the first time, a U.S. court recognized “feminism” as a political opinion²¹⁸ and recognized “Iranian women who refuse to conform to their government’s sex-specific laws and social norms” as a potential “particular social group.”²¹⁹ There are those who say this decision is a hollow victory for women in that it can be applied in only the most egregious of situations. This is not correct. In dicta, the *Fatin* court implied that had Fatin’s objections to wearing the chador or complying with Iran’s other gender-specific laws been so profoundly abhorrent to her beliefs, then they might have decided otherwise.²²⁰ The real victory for women, however, is the court’s recognition of feminism as a political opinion.

Recently, in *Safie v. INS*,²²¹ the Eighth Circuit affirmed the Immigration and Naturalization Service’s denial of asylum and withholding of deportation against a female citizen of Iran.²²² The applicant asserted that Iranian women, by virtue of the innate characteristic (their sex) and the harsh restrictions placed upon them, are a particular social group. The

215. *Fatin*, 12 F.3d at 1240.

216. *Id.* at 1242.

217. *Id.*

218. *Id.* The *Fatin* court stated, “[w]e have little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes.” *Id.* However, once again, the facts presented by Fatin and which are part of the administrative record to which the court was restricted, “do not establish that Iranian feminists are generally subjected to treatment so harsh that it may accurately be described as ‘persecution.’” *Id.*

219. *Id.* at 1241.

220. *Id.* at 1242.

221. *Safie v. INS*, No. 93-3541, 1994 WL 202393 (8th Cir. May 25, 1994).

222. The facts of this case are very similar to those of *Fatin*. Once again, the court found that the applicant failed to establish a well-founded fear of persecution: her testimony was “inconsistent and insufficiently detailed to provide a plausible account of the basis for her fear” and she failed to provide any corroborative evidence of her claimed activities. *Safie*, No. 93-3541, 1994 WL 202393 at *2.

court rejected this category as "overbroad" because "no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender."²²³ However, this court did agree with the Third Circuit that a "group of women who refuse to conform [to Iranian customs relating to women's dress and behavior] and whose opposition is so profound that they would choose to suffer the severe consequences of noncompliance may satisfy the definition [of a particular social group]."²²⁴ This is not to say that an asylum applicant must have suffered severe abuse before asylum based on membership in a social group will be granted. Rather, it means that asylum could be granted because of the applicant's membership in a social group of "women who refuse to conform and whose opposition is so profound," she faces certain persecution if she is deported to her homeland.

VI. SENSITIZING ASYLUM PROCEDURES FOR WOMEN

The weakness that becomes most apparent in these cases is the women's inability to produce sufficient evidence and documentation substantiating their claims of persecution. This weakness does not necessarily stem from invalid claims. Rather, it is an ironic twist of fate that such material is simply not available: if the police or military are the very persecutors from whom the woman is fleeing, then police and military reports documenting the persecution will not be forthcoming; if the woman is fleeing because her own government cannot or will not protect her from her abuser, then reports substantiating the intimate abuse will not be forthcoming. The interviewing procedures used to extract information about a woman's persecution are themselves often degrading and frequently lead to inaccurate characterizations of their claims:

Persecution of a woman will often take the form of sexual assault which the victim may be reluctant to divulge, or which may be difficult to prove, even if she is willing to talk about it. Few women are able to talk about such experiences to a male interviewer and very few countries have female staff involved in their refugee determination procedures. Even where a woman has been persecuted (that is, subjected to such cruel, inhuman and degrading

223. *Id.* at *3. See also *Fatin*, 12 F.3d at 1240.

224. *Safie*, No. 93-3541, 1994 WL 202393 at *3; *Fatin*, 12 F.3d at 1240. In Iran, a woman's refusal to wear the chador may result in arrest, imprisonment, fines and even whippings. However, the greatest fear of being arrested for "veillessness" is the strong possibility that additional trumped-up morals or prostitution charges will be added to the charge of "veillessness." A woman convicted of prostitution is executed. See *Neal*, *supra* note 15, at 220-221.

treatment as sexual assault), she thus finds it more difficult to establish her claim than a man.²²⁵

Once again, although the procedures are facially gender-neutral, the all-too-prevalent patriarchal view of women and their supposed place in society reveals an insensitive and ignorant adjudicatory process for women who have escaped persecution in their homeland or who are faced with persecution if deported to their homeland.

For example, neither the Immigration and Nationality Act itself nor the *INS Manual* provide for a female interpreter or adjudicator for a woman seeking asylum if circumstances so warrant.²²⁶ Thus, it is therefore most likely that a women must relate her story to a *male* interviewer or immigration judge using a *male* interpreter. She is then cross-examined on the details of her experience. Inconsistencies in her statements become grounds upon which her claim can be denied for lack of credibility.²²⁷ These apparent "inconsistencies" may actually reflect the applicant's inability to reveal to a *man* the degrading and humiliating details of the gender-based persecution. As one commentator notes, this difficulty increases for "women who, for cultural or religious reasons, will be ostracized by their families or communities if the sexual assault becomes known," and therefore are less likely to discuss the incidents when questioned.²²⁸

The *UNHCR Guidelines* suggest several measures which would permit readier access to protection for a female applicant.²²⁹ Of primary importance to women applicants would be the availability of female interviewers, interpreters and adjudicators. Such gender-sensitive procedures would facilitate the applicant's ability to overcome the emotionally degrading and humiliating barriers she experiences in explaining her particular circumstances. This is especially important when the applicant has been sexually traumatized, violated or abused. Another vital area for improvement would be training. To adequately understand the applicant's experiences, interviewers, interpreters and adjudicators must be familiar with sexual abuse and its ramifications on the applicant and her interview. Such training should include information regarding the cultural environment for male and female family member relationships and the status of women in the country from which she fled. They need to be

225. Anders B. Johnsson, *International Protection of Women Refugees: A Summary of Principle Problems and Issues*, 1 INT'L J. REFUGEE L. 221, 223 (1989).

226. Kelly, *supra* note 7, at 630 n.21. See also ASYLUM BRANCH, IMMIGRATION AND NATURALIZATION SERVICE, ASYLUM: PROCEDURES MANUAL AND OPERATIONS INSTRUCTION 15, 17 (1993).

227. Kelly, *supra* note 7, at 630.

228. *Id.*

229. See *UNHCR Guidelines*, *supra* note 65, ¶¶ 71-76.

familiar with the existing "political, economic and social rights of women, reported incidents of gender-specific violence, protection available to women" and the consequences the woman faces if she is forcibly returned to her homeland.²³⁰ Integrating these *UNHCR Guidelines* into the United States' asylum application process would provide women with a more readily accessible and sensitive safe harbor of protection, security and dignity.

VII. CONCLUSION

Most recently, an Immigration Judge in Seattle, Washington, granted a Nigerian woman's application²³¹ for suspension of deportation²³² thereby terminating the proceedings against her.²³³ Lydia Oluloro faced deportation back to Nigeria after her divorce because her abusive husband, a lawful permanent resident, failed to file the paperwork necessary for her to obtain legal residency status. Lydia was faced with a horrific decision: she could leave her two daughters, both of whom were United States citizens, with their abusive father, turn them over to the state welfare system, or take them with her back to Nigeria where they faced the certainty of genital mutilation in the form of female circumcision.²³⁴ In granting this discretionary suspension of deportation,²³⁵ the court reviewed the practice of female genital mutilation. Although the court

230. Kelly, *supra* note 7, at 673 n.239.

231. Matter of Oluloro, File No. A72 147 491 (1994) (Oral Decision of Immigration Judge on file with author.).

232. To qualify for suspension of deportation, an applicant must show that she has been physically present in the United States for seven years immediately preceding the application, that she has been a person of good moral character during that period, and that her deportation would result in extreme hardship to her, or her United States citizen or lawful permanent resident spouse, parent or child. 8 U.S.C. § 1254(a)(1), INA § 244 (a)(1) & (2).

233. Suspension of deportation leads directly to lawful permanent resident status, compared to asylum, which leads first to asylee status, and then later to permanent resident status.

234. Kay Boulware-Miller, *Female Circumcision: Challenges to the Practice as a Human Rights Violation*, 8 HARV. WOMEN'S L.J. 155, 156 (1985). The term "female circumcision" may include any of the following: circumcision, the least severe operation, in which only the prepuce or hood of the clitoris is removed; excision, in which the clitoris and all or part of the labia minora are removed without closing the vulva; and infibulation, the most severe operation in which clitoris, labia minora and all or most of the medial part of the labia majora are removed. The remaining parts of the labia majora are sutured together with catgut or thorns, leaving a tiny opening for the passage of menstrual blood and urine.

235. Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957) (quoting from Immigration Judge Kendall Thomas in his Oral Decision in *Matter of Oluloro* (File No. A72 147 491, March 23, 1994)). "Although an alien may prove her statutory eligibility of physical presence, good moral character, and extreme hardship, is not automatic that the application will be granted. Suspension of deportation is a matter of discretion and administrative grace. Therefore, the applicant also bears the burden of showing that she merits a favorable exercise of discretion." *Id.*

attempted to respect the traditions and cultures of this African society, it declared that female circumcision was "cruel, painful and dangerous."²³⁶ The court further stated that while this practice may have had some purpose in ancient cultures,²³⁷ whatever utility it may have had, no longer exists.²³⁸ The court determined that because of the strong likelihood that the two daughters would be subjected to female circumcision if they returned with their mother to Nigeria, the risk amounted to "extreme hardship to the United States citizen children."²³⁹ Lydia Oluloro's claims were made for the sake of her two daughters; she herself was prepared to return to Nigeria. The judge, by terminating the deportation proceedings against Lydia on humanitarian grounds — that is, a need to protect two young United States citizens — was able to avoid the issue of asylum.²⁴⁰ Although the court did not explicitly announce that these suspension of deportation proceedings involved a well-founded fear of *gender-based* persecution as the criterion for granting Lydia asylum, it has opened the door to this ground by acknowledging that female circumcision is an extreme hardship. For the first time, a court saw a need to protect females from forced genital mutilation whether or not cultural traditions so demanded. It is interesting to note that INS chose not to appeal this decision. Conceivably, this could be a beginning awareness of the rightness in recognizing gender-specific persecution as a ground for granting asylum. Our heretofore patriarchally influenced judicial and adjudicatory system may have finally realized that there are societies in which women are abused and persecuted solely because of their gender. Finally, it has been realized that women are victimized in ways that men are not: that women are subjected to widow-burning in India and genital mutilation in Africa, that women are forced to have abortions or be sterilized in China, or that women are systematically raped under the guise of "ethnic-cleansing" in Bosnia-Herzegovina.

236. Oluloro, *supra* note 231, at 17.

237. Boulware-Miller, *supra* note 234, at 157. Supporters and practitioners of female circumcision give many reasons for maintaining the practice. Some believe that the tissue of the uncircumcised woman must be eliminated to demarcate her sex and initiate her into womanhood. Others argue that circumcision increases fertility and live births, curbs women's sexual desires and maintains the moral fiber of society. Other proponents of the practice contend that female circumcision enhances male sexual pleasure. *Id.*

238. Oluloro, *supra* note 231, at 16.

239. *Id.* at 17.

240. *But see* In Matter of DeShields, File No. A27-927-777 (January 28, 1994), where Immigration Judge Kendall Warren (the same judge who decided *Matter of Oluloro*) denied DeShields asylum because she failed to establish a *prima facie* case for granting of asylum. Although the facts of this case are almost identical with those of *Oluloro*, the applicant did not ask for "suspension of deportation," rather, she sought asylum. The outcome might have been different had she requested "suspension of deportation" based on the extreme hardship her U.S. citizen daughter would experience upon their return to Nigeria.

Although expanding the Convention's definition of refugee to include a "well-founded fear of persecution based on gender" would be the simplest means of facilitating protection for women seeking asylum, it is not absolutely essential. Such protection can also be attained through existing laws and instruments. This protection can be achieved by recognizing "women persecuted because of their gender" as "members in a particular social group," or by classifying rape and other intimate violence against women as "persecution based on political opinion."

The recent events in Bosnia-Herzegovina have brought human rights violations against women to the forefront. Those women who have been raped and abused as part of the "ethnic cleansing" process, but who are fortunate enough to have escaped their homeland with their lives, will be faced with still another obstacle: refuge. The United States will be forced to address the issue that gender-based persecution is a human rights violation against women and that these gender-based violations establish a well-founded fear of persecution.

Women are human. Women seeking refuge from human rights violations are not demanding charity or special consideration because of their gender. They are, however, demanding that their gender-based claims for refuge and asylum be determined justly and fairly.